Supreme Court, U.S.
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No. 02 318

In The Supreme Court of the United States

DENNIS OLIVARES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. When a defendant entirely serves and discharges the one and only legally valid sentence he received, does the government - after a successful appeal and re-trial - retain the power to punish him further for that crime, or is the government's power to increase the punishment at an end?

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Docket No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 2001

DENNIS OLIVARES,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States District Court for the District of Maryland resolving Mr. Olivares' Motion To Vacate his sentence pursuant to 28 U.S.C. § 2255 was rendered on the district judge's adoption of the Report and Recommendation of United States Magistrate Judge Charles B. Day, and is not officially reported. The Report and Recommendation of Magistrate Judge Day in Case Number AW 99-0296 appears in the Appendix at pages 11-27, and the district judge's Order adopting that Report

and Recommendation appears in the Appendix at pages 28-30. After denying Mr. Olivares' § 2255 Motion, the district court granted a certificate of appealability, pursuant to § 2253(c)(1)(B). The opinion of the United States Court of Appeals for the Fourth Circuit on direct review of the denial of Mr. Olivares' § 2255 Motion is reported at *United States v. Olivares*, 292 F.3d 196 (4th Cir. 2002), and is attached in the Appendix at pages 1-10.

JURISDICTION

The Fourth Circuit entered a decision and order affirming Mr. Olivares' conviction on May 28, 2002. (App. 1). This Court has jurisdiction to review the order of the Fourth Circuit on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves the misdemeanor crime of simple assault. United States Magistrate Judge Victor H. Laws, III, originally found Mr. Olivares guilty of violating 18 U.S.C. § 113(a)(4) (Case No. M-98-2476) and sentenced Mr. Olivares on July 14, 1999. Mr. Olivares was sentenced to a fine of $500.00, a special assessment of $10.00, and unsupervised administrative probation through payment of the fine. (App. 2). Mr. Olivares paid the fine and special assessment that same day, on July 14, 1999. (App. 2). As of July 14, 1999, Mr. Olivares served and discharged the full sentence for his alleged role in the crime of simple assault.

Mr. Olivares thereafter filed a Notice of Appeal, five days later, on July 19, 1999. (App. 2). On September 15, 1999, the district court vacated the judgment of conviction and sentence and granted Mr. Olivares a new trial. (App. 12-13). Although his conviction was vacated, Mr. Olivares' full sentence was already served and his original fine was not returned by the Government.

Later in 1999, following a bench trial, United States Magistrate Judge Charles B. Day found Mr. Olivares guilty of the same offense for which Mr. Olivares was previously convicted. (App. 13). Notwithstanding his prior sentence of a $500 fine, which remained entirely served, on December 1, 1999, Magistrate Judge Day

sentenced Mr. Olivares to a completely new and stiffer sentence including, *inter alia*, 12 months of supervised probation. (App. 13-14).

Mr. Olivares immediately began serving his second harsher sentence, which was effectively placed on top of Mr. Olivares' first discharged sentence that remained fully served. On July 17, 2000, a Notice of Violation of Probation was filed and on October 5, 2000, Mr. Olivares was found to be in violation of his probation. (App. 3). The district court ordered Mr. Olivares to continue probation until December 3, 2001, and as an additional sanction, Mr. Olivares was ordered to satisfactorily complete a thirty (30) day period of confinement with work release at a community corrections facility. (App. 3). Mr. Olivares remains under the jurisdiction of the district court to this day, awaiting resolution of a pending Violation of Probation hearing.

On March 19, 2001, pursuant to 28 U.S.C. § 2255, Mr. Olivares filed a Motion to Vacate Sentence with Memorandum of Law. (App. 11). On March 27, 2001, Magistrate Judge Day filed a Report and Recommendation granting relief in part (ordering a refund to Mr. Olivares of $200.00 paid as part of the fine imposed in this case) and denying relief in part (denying Mr. Olivares' claim that the double jeopardy clause prohibited the increased punishment after Mr. Olivares' second trial). (App. 26-27). On June 13, 2001, United States District Judge Alexander Williams, Jr., issued an Order adopting the

Report and Recommendation in toto.[1] (App. 28-30). Thereafter, Judge Williams granted Mr. Olivares a Certificate of Appealability to the U.S. Court of Appeals for the Fourth Circuit, pursuant to § 2253(c)(1)(B), so that court could determine whether Mr. Olivares' rights under the Double Jeopardy Clause were violated. On May 28, 2002, the Fourth Circuit issued a published opinion denying the requested relief. (App. 1-10).

BRIEF SUMMARY OF REASONS FOR GRANTING THE WRIT

According to the Fourth Circuit in this case, the Double Jeopardy Clause is never implicated when an individual is reconvicted and resentenced after his original conviction has been vacated. (App. 9-10) (Michael, J., concurring separately). It does not matter that the defendant has fully served and discharged his entire sentence prior to having the sentence vacated. In reaching this decision, that court did not follow this Court's precedent in *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980), and instead relied on an overly broad interpretation of *North Carolina v.*

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[1] United States District Judge Alexander Williams, Jr., adopted the Report and Recommendation issued by United States Magistrate Judge Charles B. Day. Judge Williams did not issue a separate opinion. Therefore, upon adopting of the Report and Recommendation, the Report and Recommendation became the official and only opinion of the district court. Hereinafter, Mr. Olivares will refer to the Report and Recommendation as the action of the "district court."

Pearce, 395 U.S. 711, 720 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

Mr. Olivares believes that the multiple punishment protections in the Double Jeopardy Clause are violated when a defendant fully serves and discharges one legally valid sentence, then is sentenced to a harsher penalty for the same crime following a second trial or proceeding. Whether the first conviction is vacated or not is of no import once the original legally valid sentence imposed for that first conviction is discharged in full. By discharging the entire sentence, the individual has achieved finality of punishment, and the Double Jeopardy Clause steps in to prevent a subsequent enhanced sentence on that same charge.

To resolve this case, the Fourth Circuit clung to "conceptual niceties" and "unmitigated fictions." A better foundation is needed. By granting certiorari, the Court can provide the guidance that circuit courts need to assist in determining the proper scope of the Double Jeopardy Clause's bar on multiple punishments.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Address Inconsistencies In How Federal Circuit Courts Have Interpreted This Court's Double Jeopardy Clause Jurisprudence.

In *North Carolina v. Pearce*, 395 U.S. 711, 720 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S.

794 (1989), this Court explained that the Double Jeopardy Clause places no limit on our government's power to retry a defendant who has succeeded in getting his first conviction set aside. Regarding re-trial and re-conviction, this Court explained in *Pearce* that a court "may impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Id.* As the Court stated in *Pearce*, once the first conviction is set aside the slate is wiped clean. *Id.*

Despite the language in *Pearce* cited above, the two defendants in *Pearce* were only in the early stages of their sentences when they succeeded in having their convictions set aside. (App. 10). This Court explained in *Pearce* that because each defendant did serve some time, it was an "unmitigated fiction" to say that the proverbial slate is truly clean. *Id.* at 721. However, "so far as the conviction goes, and *that part of the sentence that has not yet been served*, it is no more than a simple statement of fact to say that the slate has been wiped clean." *Id.* (emphasis added). That is because "the unexpired portion of the sentence will never be served." *Id.* In *Pearce*, the "unexpired portion of the sentence" was the overwhelming majority of the sentence for both defendants. (App. 10).

Building on *Pearce*, the question presented here is whether *Pearce* foreclosed the possibility that the multiple punishment protections in the Double Jeopardy Clause can ever be implicated when a defendant is tried a second time on the same charges after his first conviction is vacated. Mr. Olivares contends that there are two situations when the Double Jeopardy Clause does limit the government's

power to reconvict and resentence after an initial conviction and sentence is vacated. First, when the original and only conviction is overturned based on insufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 11 (1978). Second, when the first and only sentence is served in full and discharged prior to it being vacated. After a defendant discharges one entire legally valid sentence in full, the government's power to extract more punishment for that offense is at an end.[2] *Cf. In re Bradley*, 318 U.S. 50, 63 (1943) (holding that when defendant paid his fine in full 3 days after sentencing, he achieved "full satisfaction" of one lawfully imposed penalty, and therefore the judgment was executed and the power of the court to punish further "was at an end").

Contrary to the holding of the Fourth Circuit in this case, Mr. Olivares respectfully submits that *Pearce* left open the question of whether the Double Jeopardy Clause limits a court's power to resentence with a stiffer penalty after a second conviction, when there is no "unexpired portion of the sentence."

After *Pearce*, at least one question remained: is there a time – before a defendant completely serves his entire sentence – when enough of the sentence has been served

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[2] Aside from the Double Jeopardy Clause, there are other constitutional provisions that do limit the government's power to reconvict and resentence following a successful appeal. For instance, due process of law protects against vindictiveness playing any part in sentencing a defendant who successfully challenged his first conviction. *See Pearce*, 395 U.S. at 725.

so that the Double Jeopardy Clause attaches to prevent enhanced resentencing? This Court addressed that question in *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980). In *DiFrancesco*, this Court discussed issues at the opposite end of the spectrum from those presented here. *DiFrancesco* addressed whether the pronouncement of a sentence alone is sufficient to provide a defendant with double jeopardy protections that would prevent a subsequent increase in the sentence. *DiFrancesco*, 449 U.S. at 137-38. Unlike *DiFrancesco*, here we are concerned not with the pronouncement of a sentence, but with the completion of a sentence. Discussing *Pearce*, the Court in *DiFrancesco* explained that "if any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at re-trial." *Id.* at 135. But the question remained: is there a rule of finality that attaches to the complete execution of a sentence? *DiFrancesco* did not answer that question directly. Instead, the Court indicated that the key to determining whether double jeopardy attaches so as to prevent enhanced re-sentencing the second time around is to decide whether a legitimate expectation of finality exists in the sentence. *Id.* at 139. The decision in *DiFrancesco* supposes that while the Double Jeopardy Clause does not absolutely bar the possibility of ever sentencing a defendant to a more severe sentence the second time around, there may be a situation when the Double Jeopardy Clause would prevent enhanced resentencing.

Since *DiFrancesco*, it has been left largely to the federal circuit courts to determine when a legitimate expectation of finality in a sentence arises for double jeopardy purposes. Although this Court never expressly developed a "test" referencing a "legitimate expectation of finality" in *DiFrancesco*, every federal circuit court following that decision has cited to *DiFrancesco* as introducing the "expectation of finality" analysis.[3] Within this framework, the circuit courts have at least reached a consensus that if a legitimate or reasonable expectation of finality develops in an initial sentence, then the double jeopardy clause will act to prevent a court from having the power to later enhance that sentence. That is until now. According to *Olivares*, it does not matter whether a defendant acquired a legitimate expectation of finality, or even actual finality. If the sentence is later vacated for whatever reason, even if finality is achieved, the trial court can resentence to a stiffer sentence without implicating double jeopardy. (App. 9).

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[3] *See United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999); *United States v. Townsend*, 178 F.3d 558, 566 (D.C. Cir. 1999); *United States v. Murray*, 144 F.3d 270, 275 (3d Cir. 1998); *Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997); *United States v. Benbrook*, 119 F.3d 338, 340 (5th Cir. 1997); *Gardiner v. United States*, 114 F.3d 734, 736 (8th Cir. 1997); *United States v. Rodreguiez*, 112 F.3d 26, 31-32 (1st Cir. 1997); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993); *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992); *United States v. Arrellano-Rios*, 799 F.2d 520, 524-25 (9th Cir. 1986); *United States v. Bello*, 767 F.2d 1065, 1070 (4th Cir. 1985); *United States v. Jones*, 722 F.2d 632, 637 (11th Cir. 1983).

Some circuits have concluded that an "expectation of finality" exists once actual finality is achieved by fully discharging a sentence. *See United States v. Silvers*,[4] 90 F.3d 95, 101 (4th Cir. 1996) (holding that "once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime"); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993) (holding that defendant acquired a legitimate expectation of finality in his incarceration, fines and restitution when the second sentencing occurred after defendant had completed period of incarceration and paid all fines and restitution in full); *United States v. Arrellano-Rios*, 799 F.2d 520, 524-25 (9th Cir. 1986) (holding that "we are certain, however, that the

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4 Prior to the instant case, the Fourth Circuit held in the most absolute terms possible that when one legally valid sentence is discharged in full, double jeopardy prevents subsequent enhanced resentencing. *See, e.g., United States v. Smith*, 115 F.3d 241, 246 (4th Cir. 1997) (stating that "[n]o doubt exists under the court's decision in *Silvers* if a defendant has fully discharged his sentence pertaining to certain counts, he may not be resentenced on those counts"). Here, the court reconciled this holding with those in *Silvers* and *Smith* by limiting those cases to situations where the "fully served" sentence was not later vacated. While Mr. Olivares understands this limitation, he respectfully submits that jurisprudence in this area, at least as far back as *Ex Parte Lange*, 85 U.S. 163 (1873), suggests that the important fact is not whether the sentence was ultimately vacated, but whether or not it was fully served.

expectation has arisen, and jeopardy has attached, upon . . . [the sentence's] completion"); *see also United States v. Rodriguez*, 112 F.3d 26, 31-32 (1st Cir. 1997) (rejecting double jeopardy claim but specifically limiting the holding by stating that "this case does not involve a petitioner who had already fully discharged his sentence"). In other words, once a sentence is served in full and discharged, any "expectation" of finality gives way to actual finality, and the Double Jeopardy Clause bars subsequent enhanced re-sentencing.

Instead of looking at the end of a defendant's sentence, other circuits have asked whether an "expectation of finality" can develop near the beginning of a sentence. These circuit courts have decided that if a defendant's appeals are still pending, there can be no "expectation of finality," and consequently no double jeopardy protection. *See, e.g., Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997) (no expectation of finality when defendant challenges sentence); *United States v. Benbrook*, 119 F.3d 338, 390 (5th Cir. 1997) (same); *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992) (same); *United States v. Murray*, 144 F.3d 270, 275 (3d Cir. 1998) (same); *but see In re Bradley*, 318 U.S. at 63 (holding prior to *DiFrancesco* that a court's power to punish was "at an end" only 3 days after sentencing, when period for filing appeal had not run, because the defendant paid his fine in full, thereby satisfying one valid legal punishment).

This case provides the Court with an opportunity to find consistency between these two extremes. Here, there is no dispute that Mr. Olivares did execute and completely

discharge one legally valid punishment before he ever filed an appeal. (App. 2). As such, arguably the power of the court to punish further was at an end. But, after discharging his sentence in full, Mr. Olivares challenged the validity of his conviction. (App. 2). Did that decision give the district court back the power it lost when Mr. Olivares fully discharged the only legally valid sentence he received?

In *Olivares*, the Fourth Circuit avoided the question entirely, by holding that because Mr. Olivares' initial sentence was vacated, it did not matter whether he served the sentence entirely or not. (App. 8-9). In so doing, the Fourth Circuit danced around *DiFrancesco* by claiming that the "expectation of finality" analysis should not be used when a conviction is vacated. (App. 8-9). The rational is that while *DiFrancesco* addresses re-sentencing after appeal, it is *Pearce* that controls the issue of re-sentencing after re-trial. Of all the circuit court decisions presented above, this is the most troubling as it overlooks this Court's unequivocal statement in *DiFrancesco* that: "While *Pearce* dealt with the imposition of a new sentence after retrial rather than, as here, after appeal, that difference is no more than a 'conceptual niceity.'" *Id.* (quoting from *Pearce*); *see also Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) (*per curiam*) (quoting the same passage again).

If the opinion in *Olivares* is correct, then absurd results follow. Imagine a defendant who receives a 50 year sentence for murder. After fully serving all 50 years, he files a Writ of Error Coram Nobis to relieve himself of

the collateral consequences associated with his conviction. He prevails and the conviction is vacated. According to *Olivares*, the slate is wiped clean and - assuming no vindictiveness - the State is free to re-try, re-convict, and re-sentence to the statutory maximum, including life in prison. Notwithstanding *Olivares*, it is difficult to imagine that many agree this person who served all 50 years was truly given a clean slate.

II. Because It Is Unique, This Case Presents The Perfect Opportunity For The Court To Resolve The Inconsistencies That Have Developed Since *DiFrancesco*.

This is a unique case. Because Mr. Olivares' first sentence consisted of a monetary fine, he was able to serve the entire sentence prior to ever filing his appeal. On direct appeal, the court vacated his conviction, and gave him a new trial, but kept his money. After re-trial, Mr. Olivares received a harsher sentence than he did the first time through.

The unique nature of this case provides the opportunity to correct inconsistencies between federal circuit court interpretations of the scope of the Double Jeopardy Clause. There are published appellate decisions explaining that no doubt exists that once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime. *See Smith*, 115 F.3d at 246. But other published decisions

explain that there can be no double jeopardy clause protection from multiple punishments while a defendant's appeals are pending. While the first set of decisions focus on the objective issue of "actual finality," the other decisions focus on the subjective nature of the reasonableness of a defendant's expectations. By granting a Writ of Certiorari in this case, the Court can provide needed guidance to the lower courts that are struggling with the scope of the Double Jeopardy Clause's bar on multiple punishments.

III. This Case Also Provides The Opportunity To Re-examine The Continuing Validity Of Portions Of The Court's Holdings In *Ex Parte Lange* and *In Re Bradley*.

In *Ex Parte Lange*, 85 U.S. 163 (1873), the Court discussed the origins of our Double Jeopardy Clause jurisprudence. Part of that discussion included Sargent Hawkins' interpretation of the Latin, "*Nemo bis punitur pro eodem delicto*," as stating "No one can be twice punished for the same crime or misdemeanor." *Lange*, 85 U.S. at 169 (quoting 2 Hawkins's Pleas of the Crown, 377). Parenthetically, there is no mention in *Lange* of an exception to this principal based on Aristotle's *tabula rasa*.

Lange involved facts different from the instant case. Nonetheless, in *Lange* this Court stated that when a prisoner, by reason of a valid judgement "fully suffered one of the alternative punishments to which alone the law

subjected him, the power of the court to punish further was gone." *Lange*, 85 U.S. at 176. The focus in *Lange* appeared to be that once a defendant was "fully punished," – past tense – the power of the court was at an end. Seventy years later, this Court decided *In Re Bradley* on essentially the same analysis developed in *Lange*. *See In Re Bradley*, 318 U.S. at 63.

In *DiFrancesco* the Court divided 5-4 and the majority's opinion severely restricted the holding in *Lange*. *DiFrancesco*, 449 U.S. at 140. Since then, the continuing validity of any precedent in *Lange* beyond its narrow facts is disputed. (App. 18). Nonetheless, in *Jones v. Thomas*, 491 U.S. 376 (1989), Justice Scalia wrote for a four Justice dissent and cited frequently to *Ex Parte Lange* and *In Re Bradley* without mentioning any broad limitation of those precedents. *Thomas*, 491 U.S. at 388-91. Justices Stevens, Brennan and Marshall, who joined Justice Scalia in *Thomas*, also dissented in *DiFrancesco*. Admittedly, the facts in *Thomas* are much closer to those in *Lange* and *Bradley* than they are to the facts here. But the principals relied on by the four Justice dissent in *Thomas* support Mr. Olivares' position here. For instance, the dissent in *Thomas* directly challenged the Court's statement there that in the multiple punishments context, "'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" *Thomas*, 491 U.S. at 392 (dissenting opinion). This language in *Thomas*, strongly challenged by the dissent, is the same exact language that the Fourth Circuit repeatedly relied on here in rejecting Mr. Olivares' double jeopardy challenge. (App. 4, 6, 8).

This Court's decisions in *DiFrancesco* and *Thomas* indicate considerable disagreement exists within the Court concerning the scope of double jeopardy protections in the context of multiple punishments. The different approaches taken by the majority and the dissent in *DiFrancesco* and *Thomas* also suggests that there is disagreement over exactly how much of the Court's thinking in *Ex Parte Lange* survived *DiFrancesco*.

Some of these same differences in thinking about the scope of our constitutional protections appeared in *Olivares*. Here, two of three judges from the Fourth Circuit relied on the most restrictive interpretations of the Double Jeopardy Clause in *Thomas* to avoid *DiFrancesco* altogether and narrow the scope of the Double Jeopardy Clause. (App. 8-9). In a concurring opinion, Judge Michael agreed with the outcome, but did not endorse the overly broad use of language in *Pearce* and *Thomas* to undercut the application of *DiFrancesco*. (App. 9-10).

The Court should grant certiorari to provide further guidance on the scope of the protections against multiple punishments in the Double Jeopardy Clause. The vigorous debate on this issue within the Court indicates that the issue is alive. The Fourth Circuit's inability to reach consensus, along with the different approaches taken by the other circuits mentioned earlier, suggests that the assistance of this Court would be beneficial.

CONCLUSION

Petitioner respectfully requests that this Court grant his Petition.

Respectfully Submitted,

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292 F.3d 196

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Dennis OLIVARES, Defendant-Appellant.

No. 01-7057.

Argued Jan. 24, 2002.
Decided May 28, 2002.

Defendant convicted of assault filed motion to vacate. The United States District Court for the District of Maryland, Alexander Williams, Jr., J., denied motion. Defendant appealed. The Court of Appeals, Luttig, Circuit Judge, held that imposition of sentence greater than that originally imposed after defendant succeeded in having first conviction vacated did not violate double jeopardy.

Affirmed.

Michael, Circuit Judge, concurred in the judgment and filed a separate opinion.

***197 ARGUED:** Booth Marcus Ripke, Fred Warren Bennett, Bennett & Nathans, L.L.P., Greenbelt, Maryland, for Defendant-Appellant. **Hollis Raphael Weisman**, Assistant United States Attorney, Greenbelt, Maryland, for Plaintiff-Appellee. **ON BRIEF:**

Thomas M. DiBiagio, United States Attorney, Greenbelt, Maryland, for Plaintiff-Appellee.

Before **WILKINSON**, Chief Judge, and **LUTTIG** and **MICHAEL**, Circuit Judges.

Affirmed by published opinion. Judge **LUTTIG** wrote the opinion, in which Chief Judge **WILKINSON** joined. Judge **MICHAEL** wrote an opinion concurring in the judgment.

OPINION

LUTTIG, Circuit Judge.

In this appeal, we must decide whether the Double Jeopardy Clause bars imposition of a sentence greater than that which was originally imposed when a defendant, who has succeeded in getting his first conviction vacated, is convicted on retrial by a different magistrate judge. The district court concluded that it does not, and we agree.

I.

A magistrate judge convicted appellant, Dennis Olivares, of assault in violation of 18 U.S.C. § 113(a)(4) and sentenced him to a fine of $500 and a $10 special assessment. J.A. 26. Olivares immediately paid the $510, and, five days later, appealed to the district court. Because the proceedings before the magistrate judge

apparently were not recorded, the district court vacated the conviction and ordered a new trial. On retrial, a different magistrate judge found Olivares guilty and sentenced him to a $300 fine, a $10 special assessment, *and* 12 months of supervised probation (which he has subsequently violated). [FN1] J.A. 27 & n. 3. Olivares did not appeal.

> FN1. After his first probation violation, the magistrate judge increased the length of probation and ordered him to spend 30 days in a community corrections facility.

In March 2001 Olivares filed a petition for a writ of habeas corpus under 28 U.S.C. § 2255, claiming that the imposition of a greater sentence at his second trial violated the Double Jeopardy Clause, because by paying the original fine, he had already discharged his sentence in full. The magistrate judge recommended denying relief except that $200 should be refunded (the difference in the fines). J.A. 37. The district court adopted the magistrate's report, J.A. 38-39, and subsequently *198 granted a certificate of appealability, J.A. 43.

II.

Olivares contends that the imposition of a more severe penalty on retrial violates the Double Jeopardy Clause. But, as the Supreme Court observed in *North*

Carolina v. Pearce, 395 U.S. 711, 720, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), when a defendant succeeds in getting his conviction set aside on grounds other than insufficiency of the evidence, "it has been settled that a corollary power of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, *whether or not it is greater than the sentence imposed after the first conviction.*" (Emphasis added). This follows from the fact that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean," *Pearce*, 395 U.S. at 721, 89 S.Ct. 2072. *See also Jones v. Thomas*, 491 U.S. 376, 381, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989) (noting that this facet of the Double Jeopardy Clause "ensure[s] that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the [legislature]").

The principal protection afforded to defendants who succeed in having their original convictions vacated is not the Double Jeopardy Clause, but rather the Due Process Clause. *See Pearce*, 395 U.S. at 725, 89 S.Ct. 2072. Due process requires that vindictiveness play no role in resentencing the defendant. *See Smith*, 490 U.S. at 798, 109 S.Ct. 2201 (recognizing that sentencing discretion "must not be exercised with the purpose of punishing a successful appeal"). [FN2]

FN2. *Pearce* placed sharp limitations on resentencing in such cases, requiring the sentencing judge to provide reasons for the increased sentence based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726, 89 S.Ct. 2072. Subsequent cases have limited *Pearce's* presumption of vindictiveness to circumstances in which there is a " 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority," *Smith*, 490 U.S. at 799, 109 S.Ct. 2201 (internal citation omitted).

Olivares, however, does not argue that his greater sentence resulted from vindictiveness on the part of the second magistrate judge. Indeed, he recognizes that the certificate of appealability issued by the district court was limited to the double jeopardy issue, *see* Appellant's Reply Br. at 11, and he has not moved for an additional certificate of appealability here. Instead, he asserts that the Double Jeopardy Clause prohibits a sentence increase upon retrial "when the defendant has acquired a 'legitimate expectation of finality.' " Appellant's Br. at 13; *see also* Appellant's Reply Br. at 11-13. For its part, the government devotes much of its brief to rebutting Olivares' assertion that he has acquired a legitimate expectation of finality. *See, e.g.,* Appellee's Br. at 5-8. But, as we explain below, expectations of finality,

legitimate or otherwise, have nothing to do with this case.

III.

We have looked to whether a defendant has acquired a legitimate expectation of finality when determining whether a subsequent increase in sentence for an *un* vacated conviction constitutes multiple punishments for the same offense, which may violate the Double Jeopardy Clause. *See, e.g.*, United States v. Bello, *199767 F.2d 1065, 1070 (1985) (discussing *United States v. DiFrancesco*, 449 U.S. 117, 138-39, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980)). *But cf.* Thomas, 491 U.S. at 381, 109 S.Ct. 2522 ("Our cases establish that in the multiple punishment context [the interest protected by the Double Jeopardy Clause] is 'limited to ensuring that the total punishment did not exceed that authorized by the legislature.' ") (quoting *United States v. Halper*, 490 U.S. 435, 450, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)) (citations omitted).

In *United States v. Silvers*, 90 F.3d 95 (4th Cir.1996), we addressed whether the district court could increase sentences on counts for which the original sentences had been fully served in an effort to make the defendant's total sentence the same as it had been before another count was vacated. We held that by serving the sentences in full for these unvacated counts, the defendant had acquired a "legitimate expectation of finality" in those sentences, and the district court could

not, consistent with the Double Jeopardy Clause, increase those sentences. *See id.* at 101.

Our holding in *Silvers* did not contradict the Supreme Court's admonition in *Pearce* that "the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed on *reconviction*," *Pearce*, 395 U.S. at 719, 89 S.Ct. 2072 (emphasis added), for the obvious reason that *Silvers* did not involve vacation of the original conviction followed by retrial and reconviction.

Nevertheless, Olivares relies on *Silvers*, arguing that "[f]or double jeopardy purposes, the analysis does not hinge on whether the sentence or punishment was vacated." Appellant's Br. at 22-23. As evidence for this assertion, he quotes *United States v. Smith*, 115 F.3d 241, 246 (4th Cir.1997), but does so completely out of context. *See* Appellant's Br. at 21-22, 23 n. 10. We did say that "[n]o doubt exists that under the court's decision in *Silvers* if a defendant has fully discharged his sentence pertaining to certain counts, he may not be resentenced on those counts," *Smith*, 115 F.3d at 246. But quite obviously we referred only to *un*vacated counts; only such counts were at issue in *Smith* and *Silvers*. Furthermore, a more broad reading would conflict with *Pearce*, as we have already explained. [FN3]

> FN3. Additionally, Olivares misunderstands our decision in *United States v. Hillary*, 106 F.3d 1170 (4th Cir.1997), claiming that we "indicate

> [d] that the important consideration for double jeopardy is ... [whether] the sentence was fully served before any appeal was taken or before any sentence was vacated," Appellant's Br. at 23 n. 10. Rather, in *Hillary*, we worried that the "active portion of Hillary's drug sentence" was going to end in 10 days. *Hillary*, 106 F.3d at 1173. We wanted to avoid the difficult issue of whether Hillary's sentence could be increased after that point, and, accordingly, directed that his "resentencing take place as soon as is just and practical." *Id.* Once again, we addressed only unvacated convictions.

Finally, Olivares insists that the district court's reasoning (and hence ours) would lead to "absurd results." Appellant's Br. at 21 n. 9, 23. He asks us to assume hypothetically that we remand on a technical issue for retrial and that in the meantime, Olivares has fully served his sentence. He opines that the district court could then sentence him to yet another prison term. True, on remand the district court could sentence him to any legally authorized punishment. *See* Pearce, 395 U.S. at 720, 89 S.Ct. 2072; *see also* Thomas, 491 U.S. at 381, 109 S.Ct. 2522. Olivares apparently forgets that "punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense," Pearce, 395 U.S. at 719-20, 89 S.Ct. 2072 (footnote omitted). He also forgets that Due Process, and not *200 Double Jeopardy, is the principal protection in this context.

In summary, we inquire into whether a defendant has acquired a legitimate expectation of finality in his sentence only when we analyze whether an increase in the sentence relating to an unvacated conviction violates the Double Jeopardy Clause. Because Olivares succeeded in getting his original conviction vacated (on grounds other than insufficiency of the evidence), the Double Jeopardy Clause is not violated by the second magistrate judge imposing a greater (though still lawful) sentence.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

MICHAEL, Circuit Judge, concurring in the judgment.

I agree with the majority that even though Olivares had fully discharged the sentence imposed after his first trial and conviction, the Double Jeopardy Clause did not bar the magistrate judge from imposing a harsher sentence following Olivares's retrial and reconviction. However, I reach this conclusion by applying the "legitimate expectation of finality" test introduced by the Supreme Court in *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), and first applied by our court in *United States v. Bello*, 767 F.2d 1065 (4th Cir.1985). Unlike the majority, I do not read *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), as holding that the Double Jeopardy Clause is never implicated when a defendant is

reconvicted and resentenced after his original conviction has been vacated. The two defendants in *Pearce* were in the early stages of their sentences when they succeeded in having their convictions set aside: one defendant was two and one-half years into a ten-year sentence, and the other was a few years into a twelve-to fifteen-year sentence. *See id.* at 713-14, 89 S.Ct. 2072. The *Pearce* Court was thus not presented with (and did not decide) the question of whether imposing a harsher sentence after the original sentence has been completely discharged violates the Double Jeopardy Clause. As a result, we can only determine whether Olivares's harsher second sentence subjected him to multiple punishments for the same offense by asking if he "had a legitimate expectation of finality as to the severity of his [first] sentence." *Bello*, 767 F.2d at 1070. Olivares wanted a second chance to gain an acquittal. To get that chance, he appealed to have his first judgment of conviction, which included his sentence, set aside. In choosing that course, Olivares had to understand that things could again go wrong at a second trial; if they did, he had no guarantee that his sentence wouldnot be increased. In other words, by appealing his first judgment of conviction, Olivares "by his own hand[ ] defeated his expectation of finality [in the first sentence], and the Double Jeopardy Clause, which guards against Government oppression, does not relieve [him] from the consequences of his voluntary choice." *United States v. Silvers*, 90 F.3d 95, 100 (4th Cir.1996) (citation and internal quotations omitted). I therefore concur in the judgment affirming the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

UNITED STATES		
OF AMERICA	)	
	)	
v.	)	Criminal No.
	)	AW- 99-0296
	)	Magistrate Judge
	)	Day
DENNIS OLIVARES	)	
	)	
_____	)	

REPORT AND RECOMMENDATION

Before the undersigned is Defendant's Motion to Alter/Change Judgment and Commitment Order, to Terminate Supervised Probation, to Alter/Change Conditions of Confinement, for Other Relief and Request for Immediate Emergency Hearing pursuant to Rule 47 of the Rules of Criminal Procedure and/or 28 U.S.C. § 2255[1] ("Defendant's Motion")(Docket Item Nos. 14-1, 14-2, 14-3, 14-4, 14-5) and the Government's Motion to Dismiss Defendant's Motions

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1 On March 19, 2001, Defendant re-filed his Motion as a motion pursuant to 28 U.S.C. § 2255. (Docket Item No. 21).

to Alter/Change Judgement Order, Etc. ("Government's Motion")(Docket Item No. 16). On February 20, 2001, the undersigned held an emergency hearing. Defendant's counsel and counsel for the Government were present. For the reasons presented below, the undersigned recommends that the Court GRANT IN PART and DENY IN PART Defendant's Motion and DENY the Government's Motion.

I. Background

On September 9, 1998, Defendant Dennis Olivares ("Defendant") assaulted a fellow employee during a union meeting at the Goddard Flight Space Center of the National Aeronautics and Space Administration in Greenbelt, Maryland. On July 14, 1999, Defendant was tried and convicted by United States Magistrate Judge Victor H. Laws, III, of misdemeanor assault in violation of 18 U.S.C. § 113(a)(4). Defendant was represented by counsel at the hearing. Judge Laws sentenced Defendant to a $500.00 fine, $10.00 special assessment fee and unsupervised probation. Defendant paid the fine and special assessment in full to the Clerk of this Court that same day. On July 19, 1999, five days after paying the fine, Defendant noted his appeal to United States District Judge Alexander Williams, Jr.

On September 15, 1999, Judge Williams ordered, *inter alia*, that "the judgment of *conviction and sentence* entered upon Defendant-Appellant on July 14, 1999 by Magistrate Judge Victor H. Laws, III, BE, and the same

hereby IS, VACATED" and "[t]hat a new trial before a Magistrate Judge of this Court be scheduled expeditiously." Order from Judge Williams (Docket Item No. 8)(emphasis added). The Government consented because, due to a clerical error, the proceedings on July 14, 1999 before Judge Laws were not recorded. (Docket Item No. 7).

On December 1, 1999, Defendant was retried in a bench trial in Greenbelt, Maryland.[2] Defendant was represented by counsel. Upon presentation of the evidence, the undersigned also found Defendant guilty of misdemeanor assault in violation of 18 U.S.C. § 113(a)(4).

At sentencing, the Government proffered evidence that subsequent to the initial conviction, Defendant had brought knives on the grounds of the Goddard Space Flight Center and implicitly threatened co-workers. This conduct, along with Defendant's trial presentation, was of some concern to the Court in that Defendant posed a threat to public safety at the Goddard Space Flight Center. The undersigned emphasized that "in the absence of" the possession of knives and the threats, a fine would have been sufficient. *See* Tr. at 108, ln. 7-22. Accordingly, the Court sentenced Defendant to: (1)

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2 The proceedings have since been transcribed and docketed under the former magistrate docket number. *See* Transcript of Trial, No. 98-2476 (December 1, 1999)("Tr.").

12 months of probation;[3] (2) a $300.00 fine;[4] (3) a $10.00 special assessment fee; (4) 20 hours of community service; (5) a mental health treatment program; (6) anger management counseling; and, (7) a bar against entering NASA except for legal matters and to remove personal items. Prior to rendering the sentence, counsel for Defendant reminded the Court that Judge Laws had only imposed a monetary fine of $500.00.

Defendant now challenges, not the power of the Court to *retry* Defendant, but the power of the Court to *sentence* him in any degree greater than the original $500.00 fine because Defendant fully paid the fine imposed by Judge Laws. Defendant maintains, "as a matter of law, the original sentence has been discharged and completed. Therefore, this Honorable Court could not impose an additional sentence after his re-trial." Defendant's Motion at 3 (*citing Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873); *United States v. Silvers*, 90 F.3d 95, 101 (4th Cir. 1996); *United States v.*

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3 Defendant was found in violation of probation on October 5, 2000. The Court extended Defendant's probation until December 3, 2001 and placed him in a half-way house for 30 days with work release. During the pendency of this Motion, the Court has received another Notice of Violation of Probation from Defendant's probation officer.

4 The undersigned noted that Defendant was entitled to a refund since the fine had been reduced from $500.00 to $300.00. Tr. at 111, ln. 20-22.

Lundien, 769 F.2d 981, 984-85 (4th Cir. 1985);[5] *Acme Poultry Corporation v. United States*, 146 F.2d 738 (4th Cir. 1945)). According to Defendant, to do so would violate Defendant's rights under the Double Jeopardy Clause. U.S. Const. amend. V.

Alternatively, Defendant argues that "this Court, on December 1, 1999, when the defendant appeared before the Court for re-sentencing, should have only imposed the same fine in the amount of $500.00, the same special assessment and noted that the fine and special assessment were discharged." Defendant's Motion at 3-4. According to Defendant, the "increased" sentence violated the prohibition against vindictiveness articulated originally in *North Carolina v. Pearce*, 395 U.S. 711 (1969) *overruled by Alabama v. Smith*, 490 U.S. 794, 801-03 (1989)(removing automatic presumption of vindictiveness).[6]

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5 *Lundien* no longer appears to be good case law in light of Fed. Crim. P. Rule 35. United *States v. Hallam*, 723 F. Supp. 66, 70 (N.D. Ind. 1989)(Rule 35 limits court's authority to alter sentence).

6 At the hearing, counsel for Defendant conceded that *North Carolina v. Pearce* has no application to Defendant's circumstances despite raising the argument in the Motion. Notwithstanding the concession, Defendant still would not have prevailed on this argument. First, the burden is on the defendant to prove actual vindictiveness when there is no reasonable likelihood of vindictiveness. Since the undersigned was not the original magistrate judge, vindictiveness for appealing was unlikely, and Defendant has not proffered any actual vindictiveness. Cf. *Chaffin v.*

Finally, if Defendant is not entitled to relief under *Ex Parte Lange* or *North Carolina v. Pearce*, Defendant requests that the Clerk of the Court be ordered to pay Defendant $200.00, the difference between the original sum paid and the fine imposed by this Court. Defendant's Motion at 6.

The Government, on the other hand, maintains that the undersigned has no original jurisdiction to hear Defendant's § 2255 Motion. Government's Motion at 2. Assuming jurisdiction, however, the Government contends that there is no double jeopardy violation "since he attacked the conviction by filing the original appeal" and, thus, has no legitimate expectation of finality in his original sentence. Government's Motion at 2.

For the reasons discussed below, the undersigned recommends that Defendant is only entitled to a refund of $200.00, as credit from the fine imposed from Judge Laws. The undersigned also recommends that the Government's Motion be denied.

Stynchcombe, 412 U.S. 17, 26-28 (1973)(second jury who imposed higher sentence did not have "personal stake"). Second, the undersigned articulated clearly on the record that the intervening potential threat to public safety was the objective reason for Defendant's sentence thereby overcoming any presumption of vindictiveness. *United States v. Goodwin*, 47 U.S. 368, 374 (1982)(there must be "objective information . . . justifying the increased sentence").

II. Jurisdiction

Under 28 U.S.C. § 636(b)(1)(B), a District Judge may designate a magistrate judge to make proposed findings of fact and recommendation for the disposition of an application for posttrial relief. A magistrate judge can hear a § 2255 Motion if both parties give "clear, unequivocal and unambiguous" consent. *United States v. Bryson*, 981 F.2d 720, 723 (4th Cir. 1992). On March 20, 2001, Judge Williams referred this instant Motion to the undersigned to make a report and recommendation. (Docket Item No. 23).

III. Double Jeopardy Argument

The Double Jeopardy Clause protects against: (1) a second prosecution for the same criminal offense after acquittal; (2) a second prosecution for the same criminal offense after conviction; and, (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Here, Defendant's double jeopardy argument is premised on the third category of protection against double jeopardy. Upon review, the undersigned recommends that Defendant's double jeopardy argument be denied as being without merit.

A. Defendant's Argument is Without Support

Defendant's argument is built on two pillars: *Ex Parte Lange*, 85 U.S. (18 Wall) 163 (1873), and *United States v. Silvers*, 90 F.3d 95 (4th Cir. 1996). The undersigned

finds these cases do not support Defendant's double jeopardy argument. The legal principles and factual underpinnings in the aforementioned cases are fundamentally different than Defendant's circumstances.

In *Ex Parte Lange*, the Supreme Court found a double jeopardy violation when the judge attempted to fine *and* imprison the defendant. 85 U.S. at 173. The governing criminal statute allowed the trial court only to either fine *or* imprison the defendant. By sentencing the defendant to both, the trial court violated the defendant's double jeopardy rights. In *United States v. DiFrancesco*, 449 U.S. 117 (1980), the Supreme Court revisited *Ex Parte Lange* and emphasized that the case is not subject to general application. *Id.* at 139. Rather, the Court limited *Ex Parte Lange* to its specific facts: "a defendant may not receive a greater sentence than the legislature has authorized." *Id.* at 140. Under the interpretation of *DiFrancesco*, the undersigned would violate Defendant's double jeopardy rights if and only if the Court were trying to exceed the authority granted in the criminal statute *at the sentencing phase*. Under 18 U.S.C. § 113(a)(4), the Court is authorized to punish a defendant "by a fine under this title or imprisonment for not more than six months, *or both*." *Id.* This is clearly not an "fine-or-imprison" situation as in *Ex Parte Lange*. The case simply is not germane to Defendant's circumstances. Thus, *Ex Parte Lange* has no application.

Defendant's second pillar likewise has no application to Defendant's situation. In *Silvers*, the defendant was

convicted, *inter alia*, of: (1) supervising a continuing criminal enterprise ("CCE"); (2) conspiracy; and, (3) two counts of interstate trafficking. 90 F.3d at 96. He received 35 years for the CCE conviction and 5 years for each interstate trafficking conviction. Each sentence ran concurrently. The conspiracy conviction was vacated by the trial judge because it merged with the CCE conviction.

After the defendant served 7 years, the government uncovered evidence that the defendant was not responsible for the CCE conviction. Upon the filing of the defendant's § 2255 motion and the government's consent, the district court vacated the CCE conviction and ordered a new trial. However, the court also re-sentenced him on the two interstate trafficking counts to run *consecutively* and reinstated the previously vacated conspiracy conviction.

The Fourth Circuit found that the trial court violated the defendant's double jeopardy right against multiple punishment because the defendant had already served 7 years, 5 of which completely discharged the defendant's sentence for the originally imposed drug trafficking counts. *Id.* at 102-03. The appellate court reasoned that the defendant had developed a "legitimate expectation of finality" as to his drug trafficking counts because he fully served the original sentence. *Id.*

At first blush, Defendant appears entitled to relief because, like the *Silvers* defendant, he discharged his sentence imposed by the Court and should not be expected to face further punishment from the

Government. However, two undisputed facts distinguish Defendant from the defendant in *Silvers*.[7]

The first fact is that the *Silvers* defendant was unlawfully re-sentenced on an *unvacated* count. Here, Defendant's conviction and sentence was vacated by Judge Williams, and a new trial was ordered. If any aspect of *Silvers* was applicable, it would be the vacated CCE count. The *Silvers* defendant successfully had his CCE conviction vacated and was entitled to a new trial, not a new trial and a guarantee of the original sentence if found guilty. By Defendant's logic, assuming after retrial the *Silvers* defendant were found guilty again on the CCE conviction, then the court could not impose a sentence greater than 35 years. At the hearing, counsel for Defendant argued as much claiming that if Defendant had served 30 days, rather than pay the fine, then appealed successfully the conviction, the undersigned could only find Defendant either not guilty or guilty with a 30-day limit on the jail time plus acknowledgment that the sentence had been previously discharged. *Silvers*, however, does not stand for such a proposition. Defendant's argument ignores Judge Williams' vacation of both Judge Law's conviction and

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7 Defendant's other cases, *Lundien*, 769 F.2d 981 and *Acme Poultry Corporation*, 146 F.2d 738, are also inapplicable. Notwithstanding the implicit overruling, *Lundien* dealt with the trial court's ability to correct its inadvertent imposition of 10-year sentence instead of a 20-year sentence. *Acme Poultry* emphasized the *lack of power of the government* or the court to appeal or modify respectively, a fine once the defendant paid his fine. Neither of these scenarios occurred in the instant case.

order *of a new trial.*

Second, in *Silvers*, the court *sua sponte* revisited the defendant's remaining convictions even though the defendant appealed only the CCE conviction. Coupled with the fact that he fully served his prison term for the interstate trafficking counts, the defendant had a legitimate expectation of finality in those sentences. Here, it is Defendant who asked Judge Williams to vacate both the conviction and sentence and have a new trial. It would be unreasonable for Defendant to expect that at the new trial he would face only a win-win situation, either receiving a not guilty verdict or an illusory "reimposition" of the paid fine.

Morever, as the Government argued at the hearing, Defendant's argument creates an absurd incentive for any defendant to always appeal the imposition of a fine, the lightest punishment contemplated by 18 U.S.C. § 113(a)(4). If Defendant were to prevail, then any defendant should pay the fine, appeal, perhaps get it vacated, and go back to trial. She would then, at worst, not get a refund of the paid fine, and, at best, receive a not guilty finding. During such a win-win appeal, valuable judicial and government resources would be wasted trying to protect the original fine. The Double Jeopardy Clause was not intended to create such incentives. *See DiFrancesco*, 449 U.S. at 137 ("The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.").

B. Defendant had no "legitimate expectation of finality."

In a double jeopardy analysis, an acquittal is afforded a degree of ultimate finality that the pronouncement of a given sentence does not. *See Bullington v. Missouri*, 451 U.S. 430, 438 (1981); *Caspari v. Bohlen*, 510 U.S. 383, 390-92 (1974). When a defendant claims a double jeopardy violation in the imposition of a sentence, a court must examine the record to see if the defendant has a "legitimate expectation of finality" in said sentence. *DiFrancesco*, 449 U.S. at 138-39; *Silvers*, 90 F.3d at 99-101. In relevant part, if a sentence is still subject to appeal and/or the defendant exercises his right to appeal, he does not have a "legitimate expectation of finality." *See Lockhart v. Nelson*, 488 U.S. 33, 38 (1988); *United States v. Bello*, 767 F.2d 1065, 1070 (4th Cir. 1985). *See also Gauntlett v, Kelley*, 849 F.2d 213, 218 (6th Cir. 1988); *United States v. Shue*, 825 F.2d 1111, 1115 (7th Cir. 1987); *United States v. Colunga*, 812 F.2d 196, 198 (5th Cir. 1987); *United States v. Arrellanos-Rios*, 799 F.2d 520, 523-24 (9th Cir. 1986); *Warner v. United States,* 926 F. Supp. 1387, 1393-94 (E.D. Ark. 1996). The undersigned finds the fact that Defendant paid his fine and immediately thereafter filed his appeal dispositive.

Ironically, *Silvers* lends contrary support to Defendant's double jeopardy argument. Although the Fourth Circuit reversed the district court's re-imposition of the trafficking sentences, the court upheld the

reinstatement of the defendant's conspiracy conviction because the defendant did not have a legitimate expectation of finality in the vacated conspiracy sentence. 90 F.3d at 100. The court reasoned that the defendant could not have such expectation because (1) he appealed the CCE conviction, of which the conspiracy conviction was premised on; and, (2) he actually received an overall lighter sentence, from 35 years to 25 years. *Id.* By reinstating the conspiracy conviction, the district court put the defendant in the position he would have been if he had not been erroneously convicted of the CCE conviction. *Id.*

In *United States v. Cochran*, 883 F.2d 1012 (11th Cir. 1989),[8] the defendant successfully appealed his four 30-year enhanced sentences running concurrently for four narcotics convictions. The district court vacated the entire sentence and resentenced the defendant to four 25-year unenhanced sentences running concurrently. On appeal, the Eleventh Circuit found no double jeopardy violation because, again, the defendant did not have a "legitimate expectation of finality." *Id.* at 1017. The circuit court pointed out that the defendant: (1) suffered no greater jeopardy on resentencing; and (2) "the defendant has, by his own hand, defeated his expectation of finality, and the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his own

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8 The Fourth Circuit adopted the analysis in *Cochran*. *Silvers*, 90 F.3d at 100 ("We find the reasoning in *Cochran* persuasive and consistent with *DiFrancesco* . . .").

voluntary choice." *Id.* at 1016 (*citing United States v. Scott*, 437 U.S. 82 (1978)). Most importantly, the circuit court remarked that the defendant who successfully vacated his sentence and is later resentenced is in a position "virtually identical to that of a defendant reconvicted following a successful appeal." *Id.* at 1017. Here, Defendant's own hand defeats any reasonable notion that he had a legitimate expectation of finality in his fine. If the Government appealed the sentence after Defendant paid the fine or the Court *sua sponte* attempted to revisit Defendant's sentence, Defendant would have a plausible double jeopardy argument. However, that is not the case here. After appeal and vacation, Defendant was back to the proverbial "square-one."

C. Defendant is not entitled to an alteration or modification in his sentence because he paid his fine.

The Court is mindful of the fact that Defendant has "completed" his sentence to the extent he paid the fine imposed by Judge Laws and received a stiffer penalty upon reconviction. Nonetheless, the impetus forcing the stiffer penalty was Defendant himself. The Double Jeopardy Clause was intended to protect defendants from the oppressive hand of the Government trying to wear them down with vast government resources. *See Green v. United States*, 355 U.S. 184, 187-88 (1957)("State with all its resources and power

should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"). It was not intended to protect a defendant from the consequences of his voluntary actions. *Cf. United States v. Foumai*, 910 F.2d 617, 621 (9th Cir. 1990)(defendant had legitimate expectation of finality because he paid the fine and time for appeal had expired); *Warner*, 926 F. Supp. at 1391 (government requesting unlawfully to re-sentence defendant on sentence already served); *Ex Parte Payne*, 598 S.W.2d 312, 316 (Tex. Civ. App. 1980)(court attempting to impose additional fine after contempt fine was paid) *overruled on other grounds*, *Huff v. Huff*, 698 S.W.2d 286 (Tex. 1983).

Nor can the undersigned ignore the *dicta* in *Pearce* dictating the appropriate treatment of Defendant's $500.00 payment:

> We think it is clear that [double jeopardy rights are] violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence *upon a new conviction for the same offense*. . . . Suppose for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years' imprisonment, *a man succeeds in getting his larceny conviction set aside* after serving three years in prison, If, *upon reconviction*, he is given a 10-year sentence, then, quite clearly, he will have

> received multiple punishments for the same offense.

395 U.S. at 718 (emphasis added). The Court declared that whatever punishment was already endured, the defendant was entitled to be "credited" for time served. More importantly, the *Pearce* Court added in a footnote that "the same rule would be equally applicable where a fine had been actually paid upon the first conviction. *Any new fine imposed upon reconviction would have to be decreased by the amount previously paid.*" *Id.* at 718 n.12 (emphasis added). The *Pearce dicta* obliterates any remaining force of Defendant's double jeopardy argument. Accordingly, the undersigned recommends that Defendant is entitled to full credit for his original payment and a refund of $200.00, the difference between Judge Law's fine and the fine imposed by the undersigned.

IV. Conclusion

The undersigned recommends that:

(1) Defendant's Motion to Alter/Change (Docket Item No. 14-1) be DENIED;

(2) Defendant's Motion to Terminate Supervised Probation (Docket Item No. 14-2) be DENIED;

(3) Defendant's Motion to Alter/Change Conditions of Confinement (Docket Item No. 14-3) be DENIED;

(4) Defendant's Motion for Other Relief (Docket Item No. 14-4) be GRANTED and that the Clerk of the Court refund Defendant $200.00;

(5) Defendant's Motion for Emergency Hearing (Docket Item No. 14-5) be GRANTED *nunc pro tunc*; and

(6) Government's Motion to Dismiss be DENIED.

Charles B. Day
United States Magistrate Judge
March 20, 2001

CBD:rv

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

UNITED STATES	*	
OF AMERICA	*	
	*	
v.	*	Civil No.
	*	AW- 99-0296
	*	
DENNIS OLIVARES	*	
	*	
	*	

AMENDED ORDER

This Order is issued upon the consideration of the Report and Recommendation of magistrate Judge dated March 20, 2001, and after a de novo review of the entire record. The Court finds that Judge Day fully considered the pleadings, supporting documents and the arguments presented at the emergency hearing conducted thereon. The Court agrees with Judge Day and similarly concludes that in the contest of these facts there was no legitimate expectation of finality; that new information presented subsequent to the initial sentence supports the subsequent sentence and belies any inference of vindictiveness; and that notwithstanding the Petitioner's payment of the fine immediately following the initial trial, there is not a Double Jeopardy violation.

Therefore, the Court accepts and will adopt the Report and Recommendation in full. Fed. R. Civ. P. 72 and Local Rule 301.5 (D. Md. 1994).

Accordingly, IT IS, this 13th day of June 2001, ORDERED:

1. That the Report and Recommendation BE, and the same hereby **IS, ADOPTED** in toto; to wit:

    a. That Defendant's Motion to Alter/Change (Docket Item No. 14-1) be and hereby **IS DENIED**; and

    b. That Defendant's Motion to Terminate Supervised Probation (Docket Item No. 14-2) be and hereby **IS DENIED**; AND

    c. That Defendant's Motion to Alter/Change Conditions of Confinement (Docket Item No. 14-3) be and hereby **IS DENIED**; and

    d. That Defendants' Motion for Other Relief (Docket Item No. 14-4) be and hereby **IS GRANTED** and that the Clerk of the Court refund Defendant $200.00; and

    e. That the Defendant's Motion for Emergency Hearing (Docket Item No. 14-5) be and hereby **IS GRANTED** *nunc pro tunc;* and

f. That Government's Motion to Dismiss be and hereby **IS DENIED**.

2. That this case is hereby CLOSED; and

3. That the Clerk of the Court docket this Order and mail copies to all counsel of record.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge